No. 95-789

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

STATE OF CALIFORNIA,
DIVISION OF LABOR STANDARDS ENFORCEMENT,
DIVISION OF APPRENTICESHIP STANDARDS,
DEPARTMENT OF INDUSTRIAL RELATIONS;
COUNTY OF SONOMA,
Petitioners,

v.

DILLINGHAM CONSTRUCTION, N.A., INC.;
MANUEL J. ARCEO, dba SOUND SYSTEMS MEDIA,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICI CURIAE FOR THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, SAN DIEGO CHAPTER, INC., ASSOCIATED GENERAL CONTRACTORS OF WASHINGTON, AND INLAND NORTHWEST CHAPTER OF ASSOCIATED GENERAL CONTRACTORS OF AMERICA IN SUPPORT OF NEITHER PARTY

WILLIAM G. JEFFERY
JEFFERY, FERRING & JENKEL
1000 Second Avenue
Suite 3300
Seattle, WA 98104
(206) 623-4600

DAVID P. WOLDS
MERRILL, SCHULTZ & WOLDS, LIMITED
401 West "A" Street
Suite 2550
San Diego, CA 92101
(619) 234-4525

* Counsel of Record

JOHN G. ROBERTS, JR.*
CARMEL MARTIN
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5810

MICHAEL E. KENNEDY
General Counsel
ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.
1957 E Street, N.W.
Washington, D.C. 20006
(202) 383-2735

Counsel for Amici Curiae

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICI CURIAE	1
STATEMENT	3
SUMMARY OF ARGUMENT	5
ARGUMENT	7
I. THE APPRENTICESHIP PROGRAMS AT ISSUE ARE EMPLOYEE WELFARE BENEFIT PROGRAMS AS DEFINED BY ERISA	7
II. ERISA'S PREEMPTION CLAUSE APPLIES TO STATE ATTEMPTS TO REGULATE ERISA-REGULATED APPRENTICESHIP PROGRAMS	9
III. IF THE SAVINGS CLAUSE OF ERISA SAVES STATE PREVAILING WAGE LAWS FROM PREEMPTION, IT DOES SO ONLY TO THE EXTENT THAT THEY APPLY FEDERAL STANDARDS PURSUANT TO A DELEGATION OF AUTHORITY UNDER THE FITZGERALD ACT	14
IV. THE MARKET PARTICIPANT ISSUE IS NOT PROPERLY BEFORE THE COURT, BUT IF CONSIDERED SHOULD NOT AFFECT THE RESULT IN THIS CASE	18
CONCLUSION	22

TABLE OF AUTHORITIES

Cases	Page
ABC National Line Erection Apprenticeship Training Trust v. *Aubry*, 68 F.3d 343 (9th Cir. 1995)	11
Alessi v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981)	11
Associated General Contractors, San Diego Chapter, Inc. v. *Smith*, 74 F.3d 926 (9th Cir. 1996)	*passim*
Building & Construction Trades Council v. *Associated Builders & Contractors of Massachusetts/Rhode Island, Inc.*, 507 U.S. 218 (1993)	19, 21
Davis v. *United States*, 114 S. Ct. 2350 (1994)	19
District of Columbia v. *Greater Washington Board of Trade*, 506 U.S. 125 (1992)	13
Electrical Joint Apprenticeship Committee v. *MacDonald*, 949 F.2d 270 (9th Cir. 1991), *cert. denied*, 505 U.S. 1204 (1992)	17
FMC Corp. v. *Holliday*, 498 U.S. 52 (1990)	12, 13
Fort Halifax Packing Co. v. *Coyne*, 482 U.S. 1 (1987)	11
Hydrostorage, Inc. v. *Northern California Boilermakers Local Joint Apprenticeship Committee*, 891 F.2d 719 (9th Cir. 1989), *cert. denied*, 498 U.S. 822 (1990)	9, 16, 21
Ingersoll-Rand Co. v. *McClendon*, 498 U.S. 133 (1990)	12, 13, 20
Inland Empire Chapter of Associated General Contractors of America v. *Dear*, 77 F.3d 296 (9th Cir. 1996)	*passim*
Keystone Chapter of ABC v. *Foley*, 37 F.3d 945 (3d Cir. 1994), *cert. denied*, 115 S. Ct. 1393 (1995)	21
Local Union 598 v. *J.A. Jones Const. Co.*, 846 F.2d 1213 (9th Cir.), *aff'd mem.*, 488 U.S. 881 (1988)	11, 13-14
Mackey v. *Lanier Collection Agency & Service, Inc.*, 486 U.S. 825 (1988)	14
Massachusetts v. *Morash*, 490 U.S. 107 (1989)	7-8
Metropolitan Life Ins. Co. v. *Massachusetts*, 471 U.S. 724 (1985)	13, 19

TABLE OF AUTHORITIES—Continued

	Page
Minnesota Chapter of ABC v. *Minnesota Dept. of Labor & Industries*, 47 F.3d 975 (8th Cir. 1995)	17
National Elevator Industry, Inc. v. *Calhoon*, 957 F.2d 1555 (10th Cir.), *cert. denied*, 506 U.S. 953 (1992)	12
New York State Conference of Blue Cross & Blue Shield Plans v. *Travelers Insurance Co.*, 115 S. Ct. 1671 (1995)	10, 11, 12, 13
Shaw v. *Delta Air Lines, Inc.*, 463 U.S. 85 (1983)	*passim*
South-Central Timber Development, Inc. v. *Wunnicke*, 467 U.S. 82 (1984)	19
White v. *Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204 (1983)	19
Statutory Provisions and Rules	
29 U.S.C. § 50	*passim*
29 U.S.C. § 1002(1)	5, 7, 8
29 U.S.C. § 1144(a)	*passim*
29 U.S.C. § 1144(c)(2)	20-21
29 U.S.C. § 1144(d)	6, 15
Cal. Lab. Code § 1771 (Deering 1991)	9
Cal. Lab. Code § 1777.5 (Deering 1991)	9, 10, 11
S. Ct. Rule 37.3	3
29 C.F.R. § 29.3	17
29 C.F.R. § 29.11	16
29 C.F.R. § 29.12(a)	15
29 C.F.R. §§ 30.1, *et seq.*	15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-789

STATE OF CALIFORNIA,
DIVISION OF LABOR STANDARDS ENFORCEMENT,
DIVISION OF APPRENTICESHIP STANDARDS,
DEPARTMENT OF INDUSTRIAL RELATIONS;
COUNTY OF SONOMA,
Petitioners,

v.

DILLINGHAM CONSTRUCTION, N.A., INC.;
MANUEL J. ARCEO, dba SOUND SYSTEMS MEDIA,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF AMICI CURIAE FOR THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, SAN DIEGO CHAPTER, INC., ASSOCIATED GENERAL CONTRACTORS OF WASHINGTON, AND INLAND NORTHWEST CHAPTER OF ASSOCIATED GENERAL CONTRACTORS OF AMERICA IN SUPPORT OF NEITHER PARTY

INTEREST OF AMICI CURIAE

Amici are three chapters of the Associated General Contractors of America, Inc. They each sponsor an apprenticeship training program. The Associated General Contractors of America, San Diego Chapter, Inc., is a

non-profit trade association composed of some 170 general and specialty contractors in southern California. It has sponsored the Associated General Contractors of America, San Diego Chapter, Inc. Apprenticeship and Training Trust Fund since 1988. That Fund was approved by the California Apprenticeship Council in 1988 to train apprentices in the construction crafts of carpenter, drywall lather, cement mason, painter, and drywall finisher, among others.

The Associated General Contractors of Washington is a non-profit trade association, founded in 1922, representing construction contractors throughout western Washington. It is a sponsor of the Construction Industry Training Council of Washington, which provides training for electricians, carpenters, painters, plumbers, and sheet metal workers. Each of these programs has been approved by and registered with the United States Department of Labor, Bureau of Apprenticeship and Training ("BAT").

Founded in 1921, the Inland Northwest Chapter, Associated General Contractors of America—formerly known as the Inland Empire Chapter—is also a non-profit trade association, representing construction contractors throughout eastern Washington. It sponsors a Carpenter Trainee program, which also is approved by and registered with BAT. The members of the Associated General Contractors of Washington and the Inland Northwest Chapter perform the majority of the construction work in the State of Washington, including public, commercial, residential, highway, bridge, industrial, and defense facilities construction.

The amici have been compelled to resort to litigation to resist excessive state regulation of the apprenticeship training programs they sponsor, regulation barred by the preemption clause of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1144(a). *Associated General Contractors, San Diego Chapter, Inc.* v. *Smith*, 74 F.3d 926 (9th Cir. 1996); *Inland Empire*

Chapter of Associated General Contractors of America v. *Dear*, 77 F.3d 296 (9th Cir. 1996). That experience affords amici a valuable perspective on the issues before this Court.*

STATEMENT

This case considers whether ERISA preempts certain state regulation of apprenticeship programs. The answer to that question turns on the particular features of the state regulation at issue. It is important to recognize that the nature and scope of state regulation of apprenticeship programs varies greatly, not only from state to state, but from one feature of apprenticeship to another. The issue in the case before the Court is whether ERISA preempts the application of California's prevailing wage law, to the extent that law requires payment of prevailing wages to apprentices in apprenticeship programs unless the program in question has been approved by a state regulatory body. The question arose in connection with an apprenticeship program that not only had not been approved by the state agency, but also had not received federal approval under the standards for such programs promulgated pursuant to the Fitzgerald Act, 29 U.S.C. § 50.

Petitioners made clear in their Petition that they did not seek to raise any question concerning the effect of ERISA on state laws that differ from the federal apprenticeship standards. *See* Pet. at 1 (Question Presented) and 26-27, n.14 ("the issue of ERISA preemption's effect on state authority to impose requirements exceeding those in the federal regulations is not presented here"). Shortly after the Ninth Circuit decided the case now before the Court, however, it decided two different cases that do pose that question. *Associated General Contractors, San Diego Chapter, Inc.* v. *Smith*, 74 F.3d 926 (9th Cir.

---

* This brief is filed with the consent of the parties pursuant to S. Ct. Rule 37.3. Copies of the consent letters have been filed with the Clerk.

1996) and *Inland Empire Chapter of Associated General Contractors of America* v. *Dear*, 77 F.3d 296 (9th Cir. 1996). The Ninth Circuit, relying heavily on its earlier decision finding ERISA preemption in this case, held that ERISA preempted the state laws at issue in those cases as well. Thus, the manner in which this Court resolves the question presented here could have an impact on the Ninth Circuit's reasoning in *Smith* and *Inland Empire*. It is therefore important to bring the circumstances of the *Smith* and *Inland Empire* cases to the Court's attention, and to explain why the result in those cases should be unaffected by whatever the Court does here.

The apprenticeship program in *Smith*, unlike the apprenticeship program at issue here, had been approved by the California Apprenticeship Council ("CAC") and conformed with federal standards. In addition, the requirements the state sought to impose in *Smith*—unlike those at issue here—were not consistent with the federal regulations governing apprenticeship programs. When the sponsor of the program at issue in *Smith* applied to expand its already approved apprenticeship program, the CAC first approved but subsequently denied the application because of a state law requirement that apprenticeship programs be allowed to expand only when a local need for apprentice training can be demonstrated—a prerequisite found nowhere in the federal regulations under the Fitzgerald Act. *See* 74 F.3d at 930 ("There is no 'need' requirement in the Fitzgerald Act").

Inland Empire dealt with a Washington prevailing wage law with an apprenticeship exception to the requirement that workers on state public works construction projects receive the "prevailing rate," but only if the apprentices were part of a program approved by a state regulatory body. The Washington regulatory scheme also prevented employer contributions to contractor-sponsored trainee programs from being counted as "usual benefits" for purposes of Washington regulation unless the trainee

programs were approved by the state authority. The apprenticeship programs in *Inland Empire*—unlike the one at issue here—met federal standards and had in fact been approved by the United States Department of Labor Bureau of Apprenticeship and Training. The state nonetheless sought to impose its additional requirement of state approval, even though the programs had satisfied federal requirements and received federal approval.

In both *Smith* and *Inland Empire*, the Ninth Circuit held that the state laws were preempted, largely on the strength of *Dillingham*. In both *Smith* and *Inland Empire*, however, the state sought to impose requirements for approval of apprenticeship programs that differed from the federal standards promulgated pursuant to the Fitzgerald Act. Thus, even if this Court were to find that the state law at issue here is not preempted, on the ground that it simply enforced federal standards promulgated under the Fitzgerald Act, the results in *Smith* and *Inland Empire* should be unaffected, because the state laws at issue in those cases are not so limited.

SUMMARY OF ARGUMENT

ERISA governs employee welfare benefit plans, and specifically defines such plans to include any plan, fund, or program established or maintained for the purpose of providing its participants or their beneficiaries apprenticeship or other training programs. 29 U.S.C. § 1002(1). The apprenticeship and training programs at issue here, as well as those at issue in *Smith* and *Inland Empire*, are therefore employee welfare benefit plans covered by ERISA. ERISA's broad preemption clause preempts any state laws that "relate to" employee welfare benefit plans. 29 U.S.C. § 1144(a). The state law at issue here, as well as those at issue in *Smith* and *Inland Empire*, explicitly refer to apprenticeship programs. Those laws accordingly "relate to" an employee benefit plan under ERISA and are therefore preempted, unless they are "saved" by ERISA's "savings clause."

An otherwise preempted state law may be saved by the savings clause if preempting the state law would interfere with federal law. 29 U.S.C. § 1144(d). Petitioners contend that preempting California's prevailing wage law, to the extent it conditions lower apprenticeship wages on state approval of the apprenticeship program, would interfere with the federal Fitzgerald Act. That Act directs the Secretary of Labor to promulgate standards for apprenticeship programs and to cooperate with appropriate state agencies in the formulation and promotion of such standards. 29 U.S.C. § 50. Regulations issued pursuant to the Fitzgerald Act provide that the Secretary may confer on a state agency the authority to determine whether an apprenticeship program conforms with the federal standards established by the Secretary under the Act. When that has happened, preempting the state law pursuant to which the state agency applies those federal standards might well be said to impair the federal law.

But if state prevailing wage laws requiring state authorization for apprenticeship programs are saved from ERISA preemption by the Fitzgerald Act, they are saved only to the extent that they apply federal standards pursuant to an express delegation of authority under the Fitzgerald Act. Any state law conditioning approval on state standards different from the federal standards under the Fitzgerald Act would not meet this test and would detract from rather than promote the goal of uniform, national standards for apprenticeship programs. Such a state law accordingly would not be saved from preemption by ERISA's savings clause.

The state law requirement of a "need" showing at issue in *Smith*, and the requirement of state approval even after federal approval has been obtained at issue in *Inland Empire*, plainly differ from the federal standards established pursuant to the Fitzgerald Act. The savings clause therefore cannot save these state law requirements from preemption, regardless of the Court's holding on the facts of this case.

ARGUMENT

I. THE APPRENTICESHIP PROGRAMS AT ISSUE ARE EMPLOYEE WELFARE BENEFIT PROGRAMS AS DEFINED BY ERISA

ERISA preempts state laws that "relate to" an employee welfare benefit plan, and defines an employee welfare benefit plan as:

> any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such a plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries * * * apprenticeship or other training programs. [29 U.S.C. § 1002(1).]

There is no doubt that the state statute at issue here relates to an employee benefit plan, because it refers expressly to apprenticeship programs, which are clearly "program[s] * * * established * * * for the purpose of providing for its participants or their beneficiaries * * * apprenticeship or other training programs * * *." *Id.* *See* Pet. App. 10. Petitioners and Amicus AFL-CIO try to develop a distinction between apprenticeship programs and programs established for the purpose of providing apprenticeship programs, *see* Pet. at 22; Brief of the Building and Construction Trades Department, AFL-CIO, in Support of Petitioners ("AFL-CIO Br.") at 5-14, but the effort is unavailing.

Amicus AFL-CIO relies on *Massachusetts* v. *Morash*, 490 U.S. 107 (1989). In *Morash*, this Court held that a company's policy concerning payments to discharged employees for their unused vacation time did not constitute an employee welfare benefit plan under ERISA. *Id.* at 120. The state statute in question provided for criminal sanctions against an employer who did not pay a discharged employee his full wages, including vacation payments, on the date of discharge. *Id.* at 109. The

employer in *Morash* moved for dismissal of the criminal charges on the ground that its vacation policy constituted an employee welfare benefit plan under ERISA and ERISA therefore preempted the criminal statute. *Id.* at 110. The parties stipulated that the employer's policy was to pay employees for unused vacation time out of general assets in lump sums upon termination of employment. *Id.* at 111.

The Court concluded that the vacation policy was not an employee benefit plan, emphasizing that the case concerned payments by a single employer out of its general assets. The Court explained that an "entirely different situation would be presented if a separate fund had been created by a group of employers to guarantee the payment of vacation benefits to laborers who regularly shift their jobs from one employer to another." *Id.* at 120-121. The vacation policy was just that—a policy—and not a "plan, fund, or program." Apprenticeship programs of the sort at issue here and in *Smith* and *Inland Empire* do not involve a one-time payment out of general funds. Rather they entail the ongoing delivery of a type of benefit—apprenticeship training—which requires an ongoing administrative structure. They are not simply a "policy" but a plan and a program.

Amicus AFL-CIO also seems to suggest that only programs or funds set up to *finance* apprenticeship programs can be considered employee welfare benefit plans, because ERISA was designed to regulate the "financial aspects of defraying the costs of apprenticeship instruction or program administration" rather than the labor standard aspects of apprenticeship training. AFL-CIO Br. at 8. This is an inappropriately restrictive interpretation of ERISA and the term employee welfare benefit plan. The definition of an employee benefit plan includes "any plan, fund, or program" established to provide an apprenticeship program, and not merely "funds" to establish such programs. 29 U.S.C. § 1002(1).

In any event, the California law is not limited in its reach to labor standards. *See* Cal. Lab. Code §§ 1771 and 1777.5 (Deering 1991). The approval process allows the state effectively to limit the provision of the employee benefit and, consequently, to regulate the administration of the employee benefit program. *Id.* More to the point, section 1777.5 regulates the financial aspects of the apprenticeship programs in question by requiring an employer to pay specified amounts into a separate fund or to the CAC if a separate fund is unavailable to the employer. Cal. Lab. Code § 1777.5. The law does not merely set labor standards, but significantly and directly affects the administrative and financial aspects of the employee benefit program—precisely the sort of regulation that the AFL-CIO suggests should trigger coverage under ERISA.

Finally, even if the state regulatory scheme only regulated the labor standards of apprenticeship programs, it would still "relate to" an apprenticeship program for ERISA preemption purposes. As the Ninth Circuit has explained, both the financial trust and the apprenticeship standards form "integral part[s] of a larger 'program' established for the purpose of providing 'apprenticeship * * * training.'" *Hydrostorage, Inc.* v. *Northern California Boilermakers Local Joint Apprenticeship Committee*, 891 F.2d 719, 728 (9th Cir. 1989), *cert. denied*, 498 U.S. 822 (1990). It is impossible to regulate apprenticeship labor standards without affecting the larger apprenticeship program, including its administration and financing.

II. ERISA'S PREEMPTION CLAUSE APPLIES TO STATE ATTEMPTS TO REGULATE ERISA-REGULATED APPRENTICESHIP PROGRAMS

Petitioners contend that there is no need to determine whether the savings clause applies to the state prevailing wage law, because that law is not preempted by ERISA in the first place. Section 514(a) provides that ERISA

"shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title * * *." 29 U.S.C. § 1144(a). "A law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1983). The law at issue here has an express "reference to" an ERISA plan; it specifically refers to apprenticeship programs and apprenticeship funds. Cal. Lab. Code § 1777.5. It is therefore preempted by ERISA.

This Court's most recent interpretation of the "relates to" phrase in the preemption clause is in *New York State Conference of Blue Cross & Blue Shield Plans* v. *Travelers Insurance Co.*, 115 S. Ct. 1671 (1995). That case, unlike this one, involved a law that did not specifically refer to an employee benefit plan, and the Court therefore had to determine whether the law had a sufficient connection with an employee benefit plan to warrant preemption. No such inquiry is necessary here. Even if it were, however, the state prevailing wage law would still be preempted as applied to apprenticeship programs.

The Court in *Travelers* held that a New York statute imposing surcharges on hospital rates for patients depending on the type of insurance coverage they had was not preempted by ERISA. *Id.* at 1680. The Court recognized that the state law had "an indirect economic effect on choices made by insurance buyers, including ERISA plans," and acknowledged that this economic effect could result in encouraging ERISA plan managers to choose one insurance carrier over another. *Id.* at 1679-80. Nevertheless, the Court concluded that this indirect economic influence did not "bind plan administrators to any particular choice and thus function as a regulation of an ERISA plan itself." *Id.* at 1679.

By requiring apprenticeship programs to obtain state approval, the state law in this case *does* bind plan administrators, at least those who want to work on state public works projects, to abide by the state's regulation of the plan itself. The approval requirement gives the state the power to define the various aspects of the program; the California statute even dictates the amount an employer must contribute in trust to support its apprenticeships and requires that an employer without its own trust fund contribute that same amount to the state agency. Cal. Lab. Code §1777.5; *see Local Union 598* v. *J.A. Jones Const. Co.*, 846 F.2d 1213, 1219 (9th Cir.) (mandating a particular level of contribution to an apprenticeship fund directly relates to the employee benefit plan), *aff'd mem.*, 488 U.S. 881 (1988). In addition, if a state denies approval, it essentially denies a plan the ability to provide employee benefits in the form of work opportunities and training to apprentices when working on state public works projects. *Id.* This type of state regulation is undoubtedly preempted by ERISA, because under ERISA "private parties, not the Government, control the level of benefits." *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 511 (1981); *see also Fort Halifax Packing Co.* v. *Coyne*, 482 U.S. 1, 10-11 (1987) (ERISA preemption was intended to preclude state interference which might result in employers lowering benefit levels).

An employer may still participate in an unapproved apprenticeship program, by shunning state projects, but such projects play such a significant role in the construction market that this alternative is more theoretical than real. *See ABC National Line Erection Apprenticeship Training Trust* v. *Aubry*, 68 F.3d 343, 347 (9th Cir. 1995) ("The market for apprenticeship programs simply does not equate with the market for health care providers.") (distinguishing *Travelers*). As the court below explained, the state prevailing wage law " 'has the effect, and possibly the aim' of encouraging participation in state approved ERISA plans while discouraging participation in unapproved ERISA plans." Pet. App. 14 (quoting

National Elevator Industry, Inc. v. *Calhoon*, 957 F.2d 1555 (10th Cir.), *cert. denied*, 506 U.S. 953 (1992)). Contrary to Petitioners' contention, this economic impact is very different from that in *Travelers*.

This Court in *Travelers* also looked "to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive" preemption. 115 S. Ct. at 1677. This Court has repeatedly emphasized that ERISA's objective is uniformity in employee welfare benefit administration. *Ingersoll-Rand Co.* v. *McClendon*, 498 U.S. 133, 142 (1990); *FMC Corp.* v. *Holliday*, 498 U.S. 52, 58-59 (1990); *Travelers*, 115 S. Ct. at 1679. The preemption clause "was intended to ensure that plans and plan sponsors would be subject to a uniform body of benefits law; the goal was to minimize the administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government. Otherwise, the inefficiencies created could work to the detriment of plan beneficiaries." *Ingersoll-Rand*, 498 U.S. at 142.

The state regulation at issue in *Travelers* was not preempted because the law did not "preclude uniform administrative practice or the provision of a uniform interstate benefit package if a plan wishe[d] to provide one." 115 S. Ct. at 1679. On the other hand, the California prevailing wage law, and similar laws in other states, do preclude uniform interstate benefit packages. If these laws are not preempted, each state may specify different required aspects of the benefit package employers wishing to offer apprenticeship programs must include to obtain state approval, contrary to established law that "ERISA pre-empt[s] state laws that mandate[] employee benefit structures or their administration." *Id.* at 1678. *See also Shaw*, 463 U.S. at 97 (holding that a state "Human Rights Law, which prohibit[ed] employers from structuring their employee benefit plans in the manner that discriminates on the basis of pregnancy, and the Disability

Benefits Law which require[d] employers to pay employees specific benefits, clearly 'relate to' benefit plans.").

Petitioners also contend, again relying on *Travelers*, that since ERISA was not designed to regulate either wages or the operative aspects of apprenticeship programs, state laws that *are* designed to do so should not be preempted. The Court in *Travelers* did not overrule this Court's conclusion that the preemption clause of ERISA was intended to "sweep more broadly than 'state laws dealing with the subject matters covered by ERISA[,] reporting, disclosure, fiduciary responsibility, and the like.'" 115 S. Ct. at 1680 (quoting *Shaw*, 463 U.S. at 98); *Ingersoll-Rand*, 498 U.S. at 141. In *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U.S. 724, 732, 739 (1985), this Court held that although ERISA "does not regulate the substantive content of welfare-benefit plans," state laws that do so "relate to" ERISA plans and are therefore preempted. As this Court explained in *FMC Corp.* v. *Holliday*, 498 U.S. at 65, an attempt to limit ERISA's preemptive scope to "core ERISA concerns * * * would be fraught with administrative difficulties, necessitating definition of core ERISA concerns * * * [and] would therefore undermine Congress' desire to avoid 'endless litigation over the validity of State action.'" (quotation omitted).

Travelers did not disturb this understanding of ERISA preemption. The Court in *Travelers* did suggest that deference be given, when possible, to allowing states to continue to regulate in areas which historically have been matters of local concern, 115 S. Ct. at 1676, but only "'if the state law has only a tenuous, remote, or peripheral connection with covered plans, as is the case with many laws of general applicability.'" *Id.* at 1680 (quoting *District of Columbia* v. *Greater Washington Board of Trade*, 506 U.S. 125, 130 n.1 (1992)); *see also J.A. Jones Const. Co.*, 846 F.2d at 1221 (state interest in regulating labor "is of no consequence" unless

the effect of the state law is "tenuous, remote or peripheral") (quotation omitted). If state law has a significant impact on an employee benefit plan, the state law's application to such a plan must be preempted; the statute may still be applied to non-ERISA plans. If the resulting limitation on state prevailing wage laws inhibits the effectiveness of such state laws, that is the "result of congressional choice and should be addressed by congressional action." *Shaw*, 463 U.S. at 106.

The prevailing wage law determines whether an employer with a certain type of employee benefit plan—an apprenticeship program—can bid for valued state public work opportunities. The law's effect on the plan is far from "tenuous, remote, or peripheral." *See Mackey* v. *Lanier Collection Agency & Service, Inc.*, 486 U.S. 825, 829 (1988) ("we have virtually taken it for granted that state laws which are specifically designed to affect employee benefit plans are preempted under § 514(a)") (quotation omitted).

III. IF THE SAVINGS CLAUSE OF ERISA SAVES STATE PREVAILING WAGE LAWS FROM PREEMPTION, IT DOES SO ONLY TO THE EXTENT THAT THEY APPLY FEDERAL STANDARDS PURSUANT TO A DELEGATION OF AUTHORITY UNDER THE FITZGERALD ACT

In their Petition for Certiorari, Petitioners asked the Court to hold that ERISA's savings clause protects from preemption "a prevailing wage law that provides tailored wage rates only for registered apprentices in apprenticeship programs approved as meeting *the standards of the Fitzgerald Act*." Pet. at 8 (emphasis added). Petitioners acknowledged that the question presented is separate and distinct from the question of whether ERISA's savings clause protects a state law that relates to *different* standards for apprenticeship programs, *not* required by the Fitzgerald Act. Pet. at 26-27 n.14.

Section 514(d) of ERISA, the savings clause, provides that "[n]othing in this subchapter shall be construed to alter, amend, modify, invalidate, impair or supersede any of the laws of the United States * * * or any rule or regulation issued under such law." 29 U.S.C. § 1144(d). Petitioners contend that the California prevailing wage law is saved from preemption because its preemption would impair the Fitzgerald Act, which provides that:

> [t]he Secretary of Labor is authorized and directed to formulate and promote the furtherance of labor standards necessary to safeguard the welfare of apprentices, to extend the application of such standards by encouraging the inclusion thereof in contracts of apprenticeship, to bring together employers and labor for the formulation of programs of apprenticeship, [and] to cooperate with State agencies engaged in the formulation and promotion of standards of apprenticeship * * *. [29 U.S.C. § 50.]

The federal Bureau of Apprenticeship and Training has promulgated apprenticeship regulations under the Act to provide national standards for approval of apprenticeship programs. 29 C.F.R. §§ 30.1, *et seq.* Regulations have also been promulgated pursuant to the Act establishing "a review, approval, and registration process for proposed apprenticeship programs administered by State Apprenticeship Councils under the aegis of the U.S. Depart. of Labor." Pet. App. 36 (quotation omitted). The regulations provide that "[t]he Secretary's recognition of a State Apprenticeship Agency or Council (SAC) gives the SAC the authority to determine whether an apprenticeship program conforms with the Secretary's published standards * * *." 29 C.F.R. § 29.12(a).

Since the Fitzgerald Act allows for and encourages a cooperative effort between states and the federal government in the administration of the *federal* apprenticeship standards, preemption of state laws related to *federal*

apprenticeship standards might well be said to impair the Fitzgerald Act. Petitioners rely on *Shaw* v. *Delta Air Lines, Inc.*, *supra*, in support of such an argument, but the federal law at issue in *Shaw* was Title VII of the Civil Rights Act of 1964. Title VII, unlike the Fitzgerald Act, explicitly preserves non-conflicting state laws, and relies on state laws for its enforcement. *Id.* at 101-102. The Court in *Shaw* noted that preemption of the state Human Rights Law at issue in that case actually would *prohibit* state enforcement of Title VII. Such a result would "frustrate the goal of encouraging state/federal enforcement of Title VII. * * * Such a disruption of the enforcement scheme contemplated by Title VII would, in the words of § 514(d), 'modify' and 'impair' federal law." *Id.* at 102.

By comparison, the Fitzgerald Act merely directs the Secretary of Labor "to formulate and promote the furtherance of labor standards * * * to safeguard the welfare of apprentices." 29 U.S.C. § 50. There is no enforcement mechanism; the regulations provide only for a voluntary adjustment of complaints before federal or state agencies. 29 C.F.R. § 29.11; *see Hydrostorage*, 891 F.2d at 731.

The Fitzgerald Act does, however, speak of cooperation between the Federal Government and the states, and regulations issued under the Act create a process for the Secretary of Labor to delegate authority to particular states to approve programs meeting federal apprenticeship standards. If prevailing wage laws requiring state approval of apprenticeship programs are therefore saved from ERISA preemption, they are only saved to the extent that they apply standards promulgated under the Fitzgerald Act. Any state effort to apply any standards different from those found in the Fitzgerald Act rules and regulations for any reason or purpose is clearly preempted. Once an apprenticeship program has been found to meet the federal standards for federal purposes, the

state may not refuse to recognize and approve that program.

The state requirements at issue in *Smith* and *Inland Empire* differed from their federal counterparts. In *Smith*, the State of California attempted to enforce a state statute requiring a demonstration of "need" for the apprenticeship program in the area. *Smith*, 74 F.3d at 928. The Fitzgerald Act does not condition approval on any such showing. In *Inland Empire*, the apprenticeship program in question had already obtained federal approval. *Inland Empire*, 77 F.3d at 298. The Fitzgerald Act allows for either state or federal approval, based on federal standards. *See* 29 C.F.R. § 29.3. The Washington regulatory scheme, however, required state approval even if federal approval had been obtained. *Compare Electrical Joint Apprenticeship Committee* v. *MacDonald*, 949 F.2d 270, 274 (9th Cir. 1991) (state regulation requiring state approval in addition to federal approval imposes a requirement independent and apart from the regulations authorized by the Fitzgerald Act and is therefore preempted), *cert. denied*, 505 U.S. 1204 (1992), *with Minnesota Chapter of ABC* v. *Minnesota Dept. of Labor & Industries*, 47 F.3d 975, 980-981 (8th Cir. 1995) (no preemption where state regulations allow state or federal approval). In addressing similar circumstances in *Shaw*, this Court stated, "[w]e fail to see how federal law would be impaired by preemption of a state law prohibiting conduct that federal law permitted." *Shaw*, 463 U.S. at 103-104.

Petitioners contend that they are merely applying the federal standards and that, if they are preempted, contractors will be able to avoid complying with the federal standards, putting contractors who do abide by the federal standards at a competitive disadvantage. To prevent this result, Petitioners assert, state governments should be allowed to "restrict the apprentice-specific wage to those to whom the nation-wide definition, in the Secretary of Labor's regulation applies—apprentices registered in pro-

grams which meet *federal* standards, and have the approval to show it." Pet. at 17 (emphasis added). This objective is consistent with the results in *Smith* and *Inland Empire*.

Unlike the application of the prevailing wage law in the case now before the Court, the application of the laws in *Smith* and *Inland Empire* resulted in a refusal to approve apprenticeship programs that met federal standards under the Fitzgerald Act. If states are allowed to impose requirements different from those imposed under the Fitzgerald Act, or may refuse to approve apprenticeship programs already found to meet the federal standards, employers with federally approved apprenticeship programs will again be at a competitive disadvantage and the goal of creating a "nation-wide definition" of apprentice programs will be defeated.

Thus, even if this Court determines that the savings clause prevents preemption of prevailing wage laws in some cases, prevailing wage laws and related state schemes that impose requirements different from the federal requirements under the Fitzgerald Act cannot be saved from preemption.

IV. THE MARKET PARTICIPANT ISSUE IS NOT PROPERLY BEFORE THE COURT, BUT IF CONSIDERED SHOULD NOT AFFECT THE RESULT IN THIS CASE

Amicus AFL-CIO contends that the prevailing wage laws at issue here are not preempted because the State acted as a "market participant" and not a regulator in applying those laws. Petitioners did not raise or address this issue in their Petition. In addition, the market participant theory is borrowed from Commerce Clause doctrine and this Court has not yet addressed whether it may be transplanted to the ERISA preemption context. *See* AFL-CIO Br. at 15 ("*All* the ERISA preemption cases decided to date by [the] Court concern state regulatory enactments * * *.") (emphasis in original). Thus, the issue is one of first impression and should not be addressed here. *See Davis* v. *United States*, 114 S. Ct. 2350, 2354 (1994) ("[W]e are reluctant to [review an issue raised by an amicus] when the issue is one of first impression * * *."). If the Court does address the issue, however, the result in this case should be unaffected, because (1) the theory is inapplicable to ERISA preemption and (2) the state action in question constitutes regulation and not market participation in any event.

Amicus AFL-CIO contends that because the laws at issue apply only to state public works, the state is acting as a market participant and not a regulator when it enforces those laws. This Court has held that the prohibition in the Commerce Clause barring state regulation that burdens interstate commerce by discriminating against out-of-state entities is inapplicable when states act not as regulators, but as participants in the market. *South-Central Timber Development, Inc.* v. *Wunnicke*, 467 U.S. 82 (1984); *White* v. *Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204 (1983).

The Court has not had occasion to apply this doctrine to ERISA, but has extended its application to preemption under the National Labor Relations Act ("NLRA"). *Building & Construction Trades Council* v. *Associated Builders & Contractors of Massachusetts/Rhode Island, Inc.*, 507 U.S. 218 (1993). In doing so, however, the Court indicated that, since "[t]he NLRA contains no express pre-emption provision," it would not find preemption "unless [the state action] conflicts with federal law or would frustrate the federal scheme, or unless [the Court could] discern from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the States." *Id.* at 224 (quoting *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U.S. at 747-748).

In sharp contrast, ERISA has a very broad, explicit preemption clause, reaching "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a). There is no exception for situations in which the state purportedly acts as a market participant, and this Court may not read an exception into the plain language of a statute when Congress has not provided one. The explicitness of this statutory language limits the need to delve into the precedent and legislative history of ERISA. *See Ingersoll-Rand*, 498 U.S. at 138 ("Where * * * Congress has expressly included a broadly worded pre-emption provision in a comprehensive statute such as ERISA, our task of discerning congressional intent is considerably simplified.").

Amicus AFL-CIO contends that the language of the preemption clause limits preemption to state regulation because the term "State" is defined to include "a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans." 29 U.S.C. § 1144(c)(2). Amicus argues that the use of the term "regulate" "provides an indication that preemption of state *regulation* is indeed what Congress had in mind in the ERISA preemption provision, not displacement of state authority to decide with whom the state will do business, and on what terms." AFL-CIO Br. at 17 (emphasis in original).

This argument, however, is inconsistent with Supreme Court precedent. This Court has confirmed that the definition of "State" within the preemption provision was intended to "expand[], rather than restrict[]" the general definition of "State" in ERISA. *See Ingersoll-Rand Co.*, 498 U.S. at 141. The AFL-CIO brief tries to save its argument by claiming that, even if the definition of "State" in the preemption section in § 1144(c)(2) is not a limitation on the general definition, it "does provide an indication that what Congress had in mind in adopting

ERISA's preemption provision is *not* different from what Congress ordinarily has in mind when preempting state law." AFL-CIO Br. at 17 n.8 (emphasis in original). This makes no sense; terming § 1144(c)(2) an "indication" of congressional intent to limit the general definition of "State" makes the section no less of a limitation, and this Court has already held that the purpose of the definition was to expand rather than restrict the general definition of "State."

Even if the market participant theory can be applied to ERISA preemption, it is irrelevant here because, as the Ninth Circuit held, California clearly acts as a regulator and not a market participant when it applies the prevailing wage and apprentice laws to contractors. Pet. App. 21 (citing *Hydrostorage*, 891 F.2d at 730). The market participant doctrine does not apply when a state acts with an "interest in setting policy," *Building & Trades Council*, 113 S. Ct. at 1197, and California undoubtedly acts with that purpose when it enforces its prevailing wage and apprentice laws.

In their Petition, Petitioners admitted, indeed went to great lengths to explain, that the prevailing wage and apprentice laws are designed to regulate wages and the operative aspects of apprenticeship programs. Pet. at 24-27. Petitioners emphasized that the State's role with respect to apprenticeship programs is motivated by the governmental objective "to provide young people with the training to succeed in the adult world of work." Pet. at 25. In enforcing these laws, the State acts in its "traditional" role as regulator of wages and apprenticeships. *Id.* at 25-27. Thus, it is not surprising that the State has not raised the market participant theory in this Court. The State has no doubt recognized its inconsistency with their position regarding the Fitzgerald Act. *See Keystone Chapter of ABC* v. *Foley*, 37 F.3d 945, 955-956 n.15 (3d Cir. 1994) (recognizing the contradiction between applying the market participant theory and claiming a traditional

role as regulator of labor standards), *cert. denied,* 115 S. Ct. 1393 (1995).

CONCLUSION

For the foregoing reasons, if the Court holds that the savings clause saves from preemption prevailing wage laws restricting payment of lower apprentice specific wages to apprentices in state-approved programs, only state approval laws that apply federal standards pursuant to a delegation of authority under the Fitzgerald Act should be saved from preemption.

Respectfully submitted,

WILLIAM G. JEFFERY
JEFFERY, FERRING & JENKEL
1000 Second Avenue
Suite 3300
Seattle, WA 98104
(206) 623-4600

DAVID P. WOLDS
MERRILL, SCHULTZ & WOLDS, LIMITED
401 West "A" Street
Suite 2550
San Diego, CA 92101
(619) 234-4525

* Counsel of Record

JOHN G. ROBERTS, JR.*
CARMEL MARTIN
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5810

MICHAEL E. KENNEDY
General Counsel
ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.
1957 E Street, N.W.
Washington, D.C. 20006
(202) 383-2735

Counsel for Amici Curiae